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October 6, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Oral Ex Parte Presentation in PP Docket No. 93-253
Proposal for Investment Company Participation
in Designated Entity Control Groups and
Rejection of a 10% Population-Based License Cap

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(2) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(2)(1993), this is to provide an original and one copy of a notice of an ex parte presentation made on October 5, 1994 by Dave Lasier, Chief Executive Officer of Encompass, Inc. and Shelley L. Spencer and Eugene DeJordy of Swidler and Berlin, Chtd. to Sara F. Seidman, Special Assistant, Office of General Counsel, Peter A. Tenhula, Office of General Counsel and Donald H. Gips, Deputy Chief, Office of Plans and Policy. At the meeting, the structure for qualifying to bid as a designated entity in the entrepreneurial blocks was discussed in addition to possible changes to the Commission's competitive bidding rules for designated entities.

Copies of materials provided at the meeting are attached. Also attached is a proposal for permitting ownership interests by "investment companies" in the control group of designated entities bidding in the entrepreneurial blocks. Specifically, Encompass recommends that the FCC:

- (1) adopt the definition of an investment company as defined in The Investment Company Act of 1940, as amended (the "Investment Company Act"), 15 U.S.C. § 80a-3 (1988), without incorporating or adopting the exemptions contained in § 80a-3(c) which, if adopted,

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would exclude most, if not all, venture capital firms;*

(2) impose the same gross revenue cap of \$125 million that is applied to the entrepreneurial blocks to the gross revenues over the past two calendar years of investment companies who invest in the designated entity control group;

(3) permit investment companies to obtain up to a 30% equity and voting interest in the control group;

(4) require that the members of the control group, excluding an investment company or investment companies collectively, qualify as a small business or consist entirely of women and minorities; and

(5) maintain the 25% equity requirement for the control group's interest in the bidding entity.

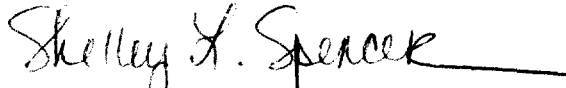
In addition, Encompass encourages the Commission to retain its 10% license-based restriction for bidders in the entrepreneurial block or to adopt a minimum bidding limitation based on 25% of the population in the BTAs nationwide, not 10%. A 10% population-based restriction will severely hamper the business strategies of designated entities and the flexibility necessary for all designated entities to succeed. Most significantly, a 10% population-based restriction would put C&F block licenses at a competitive disadvantage by impeding their ability to achieve the economies of scale necessary to compete with the MTA licensees and the vast networks of cellular carriers such as AT&T/McCaw. The competitive PCS market will demand that designated entities maximize their economies of scale to lower their cost structure and compete with the licensees in the MTA bands. As the proliferation of regional wireless networks such as AT&T/McCaw, Bell Atlantic/NYNEX, and AirTouch/US West suggest,

* The exemptions contained in § 80a-3(c) include an exemption that removes from the definition of "investment company" any issuer whose outstanding securities are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. Most if not all venture capital firms and funds qualify for this exemption. Accordingly, inclusion of this exemption from the definition of investment company would prevent venture capital firms from investing in control groups of designated entities.

Mr. William F. Caton
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overly restricted geographical PCS networks will not succeed.
A 10% license-based or 25% population-based cap on the licenses
obtained by bidders in the entrepreneurial block will enhance the
probability of success of all designated entities.

Sincerely,

A handwritten signature in dark ink, appearing to read "Shelley L. Spencer", with a long horizontal flourish extending to the right.

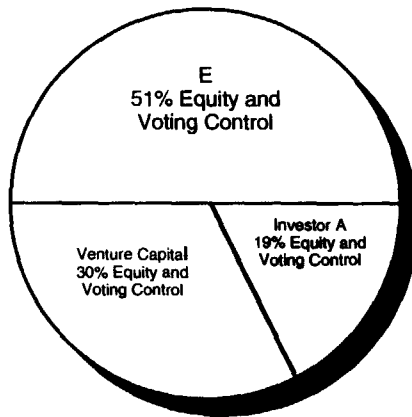
Shelley L. Spencer
Eugene DeJordy

Attachments

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Donald H. Gips
Sara F. Seidman, Esq.
Peter A. Tenhula, Esq.

Designated Entity Ownership Positions

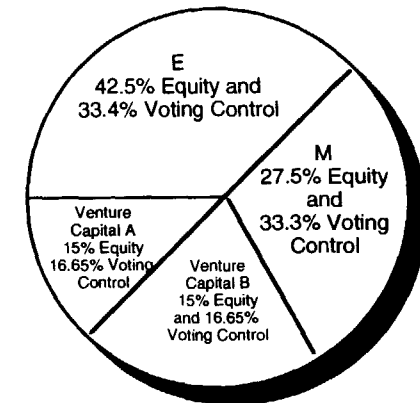
Service Company



Current Activities

- Engineering Services
- Software Products
- Feasibility Studies
- Etc.

Designated Entity PCS Company

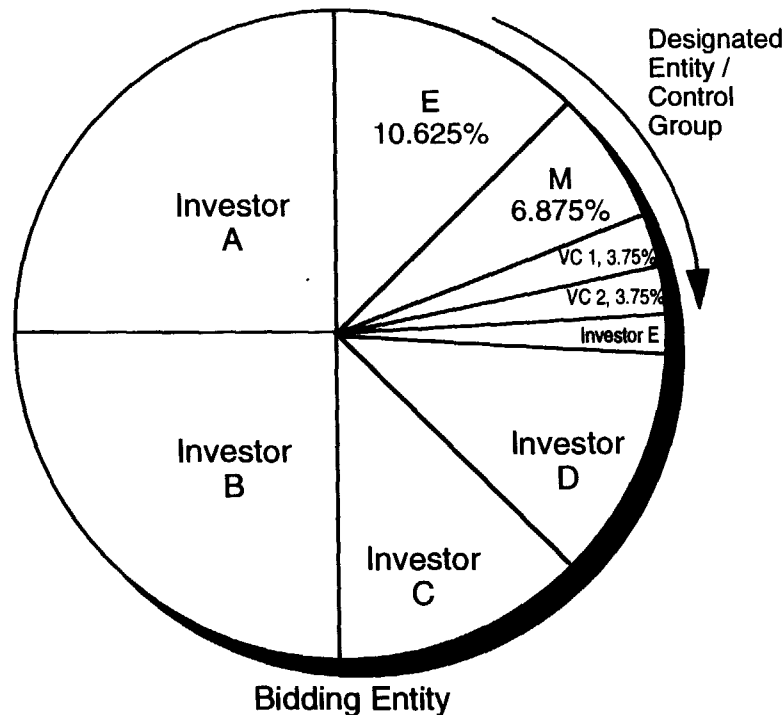


Control Group

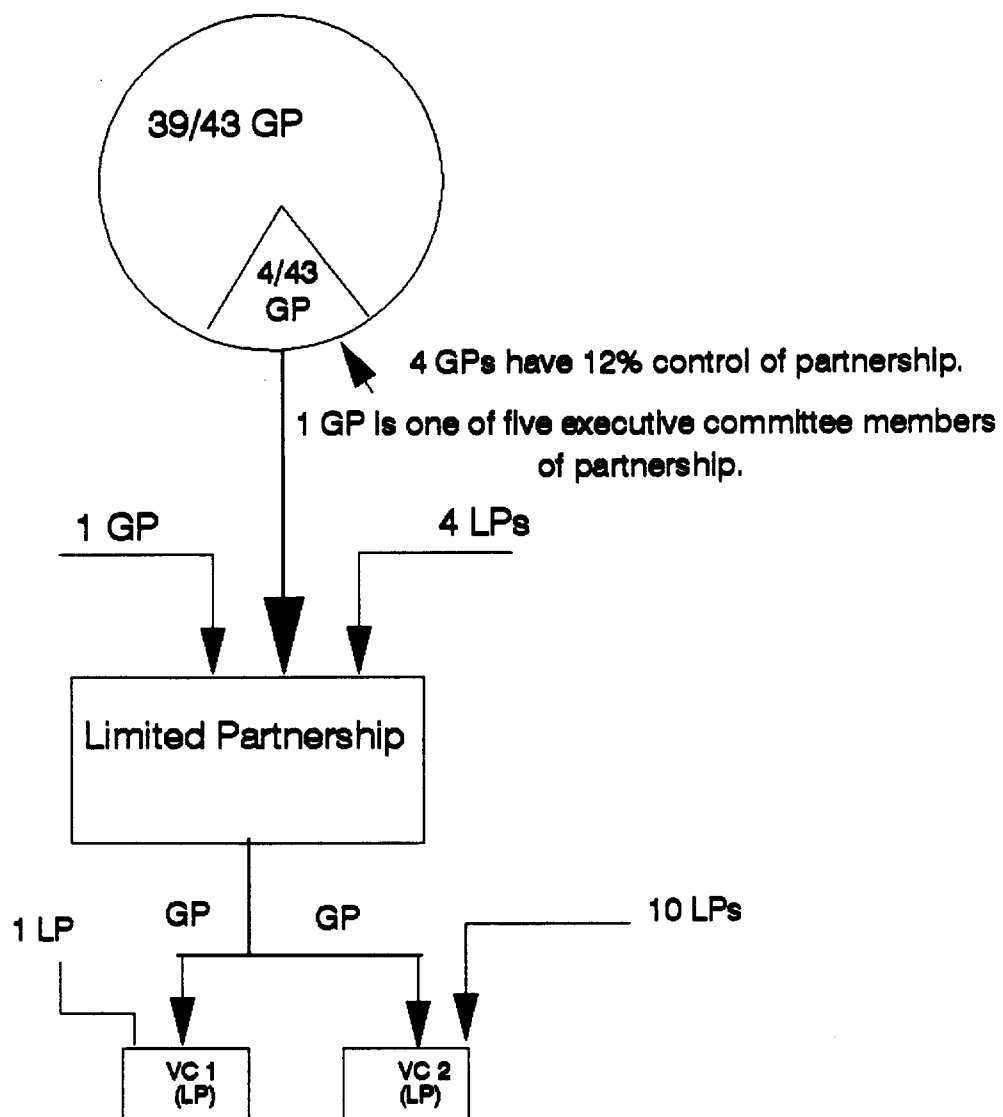
Current Activities

- Management and Operational Responsibility
- Auction Strategy
- Business Model
- Standards Support
- Vendor Negotiations
- Site Acquisition
- Market Planning
- Market Research
- Network Design
- Competitive Analysis
- Shareholder Agreements
- Partnership Issues

PCS Operating Company



Bidding Entity



**PROPOSAL FOR PERMITTING INVESTMENT COMPANY INTERESTS
IN DESIGNATED ENTITY CONTROL GROUPS**

The FCC's competitive bidding rules for broadband PCS currently require that all members of a bidding entity's control group collectively meet the requirements for qualifying to bid in the entrepreneurial blocks and for qualifying as a designated entity, *i.e.*, a small business or business owned by minorities or women. For small businesses, such as Encompass, Inc., this rule requires that the aggregate revenues of all members of the control group not exceed \$40 million and that each member of the control group have a personal net worth of less than \$40 million. While well intentioned, the strict requirements of this rule have inhibited the ability of designated entities as a control group to raise capital from traditional funding sources such as venture capital firms. The ability to raise capital at the control group level, not just at the bidding entity level, is proving critical to designated entity participation in PCS.

To address the realistic constraints faced by designated entities and venture capital firms eager to fund designated entities at the control group level, the Commission should modify its rules for control groups to permit "investment companies" to obtain up to a 30% equity and voting interest in the control group without attributing the revenues or assets of the investment company or the personal net worth of any individual investor in the investment company to the control group. (A proposed modified rule is attached as Exhibit A). The exclusion of investment companies from qualification of the control group will permit designated entities to raise the

necessary capital to fund the control group while still ensuring that designated entities maintain a controlling interest in the control group. Specifically, Encompass recommends that the FCC:

(1) adopt the definition of an investment company as defined in Section 80a-3 of The Investment Company Act of 1940, as amended (the "Investment Company Act"), 15 U.S.C. § 80a-3 (1988), without incorporating or adopting the exemptions contained in § 80a-3(c) which, if adopted, would exclude most, if not all, venture capital firms;¹

(2) impose the same gross revenue cap of \$125 million applied to the entrepreneurial block to the gross revenues over the past two calendar years of investment companies who invest in the designated entity control group;

(3) permit investment companies to obtain up to a 30% equity and voting interest in the control group;

(4) require that the members of the control group excluding an investment company or investment companies collectively qualify as a small business or consist entirely of women and minorities; and

(5) maintain the 25% equity requirement for the control group's interest in the bidding entity.

¹ The exemptions contained in § 80a-3(c) include an exemption that removes from the definition of "investment company" any issuer whose outstanding securities are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. Most, if not all, venture capital firms and funds qualify for this exemption. Accordingly, inclusion of this exemption from the definition of investment company would prevent venture capital firms from investing in control groups of designated entities.

1. AN "INVESTMENT COMPANY" DEFINED

Under Section 80a-3 of the Investment Company Act, an investment company is defined as:

an issuer which--

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having value exceeding 40 percentum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.²

Excluded from the definition of "investment company" are issuers primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding or trading in securities.³

The FCC has incorporated this definition of investment company in the Commission's broadcast multiple ownership rules. See 47 C.F.R. § 73.3555, n.2(c). Incorporation of the definition of an investment company and the exemptions to that definition contained in § 80a-3(b) into the FCC's broadband PCS competitive bidding rules will permit traditional investment sources, such as institutional investors and venture capital funds, to provide a

² 15 U.S.C. § 80a-3(a). (A copy of § 80a-3 is attached at Exhibit B.)

³ 15 U.S.C. § 80a-3(b).

source of capital for designated entities while not permitting unrestricted access to the control group and without eliminating its control.

2. IMPOSITION OF A REVENUE CAP

The FCC should impose a revenue cap of \$125 million in gross revenues for the past 2 calendar years on investment companies that invest in the control group of a designated entity. This revenue cap is identical to the revenue cap adopted by the FCC generally for bidding in the entrepreneurial block and will ensure that the control group, especially in the case of small businesses, remains relatively "small." Large investment companies whose revenues exceed the revenue cap could, of course, invest as a passive investor in the bidding applicant.

**3. INVESTMENT COMPANIES SHOULD BE ELIGIBLE
TO OBTAIN UP TO 30% OF THE EQUITY
AND VOTING INTEREST IN THE CONTROL GROUP**

AND

**4. MEMBERS OF THE CONTROL GROUP, EXCLUDING
INVESTMENT COMPANIES, SHOULD COLLECTIVELY QUALIFY
AS A SMALL BUSINESS OR BE WOMEN AND MINORITIES**

Investment companies investing in the control group should be permitted to acquire up to 30% of the equity and voting interests in a control group. This minority share will ensure that the remaining 70% is held by entities that in their entirety qualify as small businesses or are women and/or minorities. This 30% share and the ability to acquire voting rights will provide the necessary incentive for designated entities to attract venture capital. A lesser amount or a non-voting

interest will not be sufficient to attract significant funding from a venture capital firm.

5. **THE CONTROL GROUP SHOULD MAINTAIN A 25% EQUITY REQUIREMENT FOR THE CONTROL GROUP'S INTEREST IN THE BIDDING ENTITY**

The FCC's requirement that the control group maintain a 25% equity interest and 50.1% voting control of a bidding entity should not be modified. Small businesses need to raise funds to contribute to the bidding entity and for pre-auction activities such as market and business case analysis. Liberalization of the control group rules will facilitate the control group's acquisition of capital. By contrast, reducing the equity interest held by the control group in the bidding entity from, for example, 25% to 15%, will merely push more investors into the bidding entity and away from the control group leaving the control group once again in a position of having to raise capital under strict limitations and without access to venture capital. Accordingly, Encompass strongly opposes any change in the 25% equity interest and 50.1% voting control requirements for a control group's interest in the bidding entity.

EXHIBIT A

PROPOSED MODIFIED RULE

An investment company, as defined in 15 U.S.C. § 80a-3(a) and (b), and without reference to or incorporation of the exemptions set forth in 15 U.S.C. § 80a-3(c), shall be eligible to invest in the control group of an entity bidding in the entrepreneur's blocks without its revenues or assets or the personal net worth of its investors being attributable to the control group provided:

- (1) that the aggregate equity and voting interests of any investment companies in the control group do not exceed 30% of the equity and voting interest of the control group;
- (2) that the annual gross revenues of the investment companies for the last two calendar years do not exceed \$125 million; and
- (3) the members of the control group, other than the investment companies, collectively qualify as a small business or are all women and/or minorities.

EXHIBIT B

5TH SECTION of Level 1 printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH P.L. 103-262, APPROVED 5/31/94 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 2D. INVESTMENT COMPANIES AND ADVISORS
INVESTMENT COMPANIES

15 USCS § 80a-3 (1994)

§ 80a-3. Definition of investment company

(a) Definitions. When used in this title, "investment company" means any issuer which--

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percentum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

(b) Exemption from provisions. Notwithstanding paragraph (3) of subsection (a), none of the following persons is an investment company within the meaning of this title:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this title applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its

own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

§

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Further exemptions. Notwithstanding subsection (a), none of the following persons is an investment company within the meaning of this title:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. For purposes of this paragraph:

(A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper) unless, as of the date of the most recent acquisition by such company of securities of that issuer, the value of all securities owned by such company of all issuers which are or would, but for the exception set forth in this subparagraph, be excluded from the definition of investment company solely by this paragraph, does not exceed 10 per centum of the value of the company's total assets. Such issuer nonetheless is deemed to be an investment company for purposes of section 12(d)(1) [15 USCS § 80a-12(d)(1)].

(B) Beneficial ownership by any person who acquires securities or interests in securities of an issuer described in the first sentence of this paragraph shall be deemed to be beneficial ownership by the person from whom such transfer was made, pursuant to such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title, where the transfer was caused by legal separation, divorce, death, or other involuntary event.

(2) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, and acting as broker, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; or any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interest in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4), and (5), or in one or more of such businesses (from which not less than 25 per centum of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7) Reserved.

(8) Any company subject to regulation under the Public Utility Holding Company Act of 1935.

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(11) Any employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986 [26 USCS § 401]; or any governmental plan described in section 3(a)(2)(C) of the Securities Act of 1933 [15 USCS § 77c(a)(2)(C)]; or any collective trust fund maintained by a bank consisting solely of assets of such trusts or governmental plans, or both; or any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of section 401 of the Internal Revenue Code of 1986 [26 USCS § 401] or the requirements for deduction of the employer's contribution under section 404(a)(2) of such Code [26 USCS § 404(a)(2)], (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 5 of the Securities Act of 1933 [15 USCS §§ 77e] by section 3(a)(2)(C) of such Act [15 USCS § 77c(a)(2)(C)], and (C) advances made by an insurance company in connection with the operation of such separate account.

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and

15 USCS § 80a-3 (1994)

short-term paper.

HISTORY: (Aug. 22, 1940, ch 686, Title I, § 3, 54 Stat. 797; Oct. 21, 1942, ch 619, Title I, Part I, § 162(e), 56 Stat. 867; July 1, 1966, P.L. 89-485, § 13(i), 80 Stat. 243; Dec. 14, 1970, P.L. 91-547, § 3(a), (b), 84 Stat. 1414, 1415; Feb 5, 1976, P.L. 94-210, Title III, § 308(c), 90 Stat 57; Oct. 21, §1980, P.L. 96-477, Title I, § 102, Title VII, § 703, 94 Stat. 2276, 2295.)

(As amended Dec. 4, 1987, P.L. 100-181, Title VI, §§ 604-606, 101 Stat. 1260.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

REFERENCES IN TEXT:

"This title", referred to in this section, is Title I of Act Aug. 22, 1940, ch 686, 54 Stat. 789, which appears generally as 15 USCS §§ 80a-1 et seq. For full classification of this Title, consult USCS Tables volumes.

"The effective date of the Revenue Act of 1936", referred to in this section, is probably intended to be a reference to the date of enactment of Act June 22, 1936, ch 690, 49 Stat. 1756, which was enacted June 22, 1936.

"Section 214 of the Interstate Commerce Act", referred to in this section, is § 214 of Act Feb. 4, 1887, ch 104, 24 Stat. 379, which formerly appeared as 49 USCS § 314, prior to the enactment of Title 49 into positive law by Act Oct. 17, 1978, P.L. 95-473, § 3(b), 92 Stat. 1466; similar provisions now appear as 49 USCS § 11302.

"The Public Utility Holding Company Act of 1935", referred to in this section, is Act Aug. 26, 1935, ch 687, Title I, 49 Stat. 838, which appears generally as 15 USCS §§ 79 et seq. For full classification of this Act, consult USCS Tables volumes.

EFFECTIVE DATE OF SECTION:

For the effective date of this section, see Act Aug. 22, 1940, ch 686, Title I, § 53, 54 Stat. 847, which appears as 15 USCS § 80a-52.

AMENDMENTS:

1942. Act Oct 21, 1942, in subsec. (c)(13), inserted "as amended".

1966. Act July 1, 1966, in subsec. (c), deleted para. (4) which read: "Any holding company affiliate, as defined in the Banking Act of 1933, which is under the supervision of the Board of Governors of the Federal Reserve System by reason of the fact that such holding company affiliate holds a general voting permit issued to it by such Board prior to January 1, 1940; and any holding company affiliate which is under such supervision by reason of the fact that it holds a general voting permit thereafter issued to it by the Board of Governors and which is determined by such Board to be primarily engaged directly or indirectly, in the business of holding the stock of, and managing or controlling, banks, banking associations, savings banks, or trust companies. The Commission shall be given appropriate notice prior to any such determination and shall be entitled to be heard. The definition of the term 'control' in section 2(a) shall not apply to this paragraph."

1970. Act Dec. 14, 1970 (effective upon enactment on 12/14/70, as provided by § 30 of such Act, which appears as 15 USCS § 80a-52 note), in subsec. (b)(2), inserted "in good faith"; and in subsec. (c), in introductory para., substituted "Notwithstanding subsection (a), none of the following persons is an investment company within the meaning of this title:" for "Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the